

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0001

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SHAWN EARL McCLURE,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighteenth Judicial District Court, Gallatin County,
The Honorable John C. Brown, Presiding

APPEARANCES:

STEVE BULLOCK
Montana Attorney General
JONATHAN M. KRAUSS
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

COLIN M. STEPHENS
Smith & Stephens, P.C.
315 West Pine
Missoula, MT 59802

ATTORNEY FOR DEFENDANT
AND APPELLANT

MARTY LAMBERT
Gallatin County Attorney
ASHLEY WHIPPLE
Deputy Gallatin County Attorney
1709 W. College
Bozeman, MT 59715

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE AND THE FACTS	1
SUMMARY OF THE ARGUMENT	6
ARGUMENT	7
I. McLURE WAIVED HIS RIGHT TO PERSONALLY APPEAR AND DEFEND AT TRIAL BY VOLUNTARILY REMOVING HIMSELF FROM THE COURTROOM, AND HE RAISES THE ISSUE FOR THE FIRST TIME ON APPEAL.....	7
A. Standard of Review	7
B. McClure Raises the Issue of His Absence From Trial for the First Time on Appeal	7
C. McClure’s Voluntary Absence Constituted a Waiver of His Right to Be Present.....	8
II. McCLURE DID NOT MAKE AN UNEQUIVOCAL REQUEST TO REPRESENT HIMSELF AT HIS THIRD TRIAL, AND RAISES THE ISSUE FOR THE FIRST TIME ON APPEAL	12
A. Standard of Review	12
B. Discussion	13
CONCLUSION.....	15
CERTIFICATE OF SERVICE	16
CERTIFICATE OF COMPLIANCE.....	16

TABLE OF AUTHORITIES

CASES

Adams v. Carroll, 875 F.2d 1441 (9th Cir. 1989)	13
Diaz v. United States, 223 U.S. 442 (1912)	9
Faretta v. California, 422 U.S. 806 (1975)	13
State v. Browning, 2006 MT 190, 333 Mont. 132, 142 P.3d 757	13, 14
State v. Brush, 228 Mont. 247, 741 P.2d 1333 (1987).....	12
State v. Clark, 2005 MT 169, 327 Mont. 474, 115 P.3d 208	10
State v. Colt, 255 Mont. 399, 843 P.2d 747 (1992).....	13
State v. Craig, 274 Mont. 140, 906 P.2d 683 (1995).....	14
State v. Cybulski, 2009 MT 70, 349 Mont. 429, 204 P.3d 7	8
State v. Dubois, 2006 MT 89, 332 Mont. 44, 134 P.3d 82	12
State v. Godfrey, 2009 MT 60, 349 Mont. 335, 203 P.3d 834	12
State v. Hurlbert, 2009 MT 221, 351 Mont. 316, 211 P.3d 869	8, 15

TABLE OF AUTHORITIES (Cont.)

State v. Langford, 267 Mont. 95, 882 P.2d 490 (1994).....	12, 13
State v. Malloy, 2004 MT 377, 325 Mont. 86, 103 P.3d 1064	7-8
State v. McCarthy, 2004 MT 312, 324 Mont. 1, 101 P.3d 288	7, 8, 9, 10
State v. Micklon, 2003 MT 45, 314 Mont. 291, 65 P.3d 559	8
State v. Price, 2009 MT 129, 350 Mont. 272, 207 P.3d 298	11-12
State v. Swan, 2000 MT 246, 301 Mont. 439, 10 P.3d 102	12, 13, 14
State v. West, 2008 MT 338, 346 Mont. 244, 194 P.3d 683	7
Taylor v. United States, 414 U.S. 17 (1973)	9
United States v. Robinson, 913 F.2d 712 (9th Cir. 1990)	13

OTHER AUTHORITIES

Montana Code Annotated

§ 1-3-207.....	8
§ 46-8-102.....	13
§ 46-16-122.....	10
§ 46-16-122(3).....	9, 10
§ 46-16-123(2)(a).....	11
§ 46-20-104(2).....	7

TABLE OF AUTHORITIES (Cont.)

Montana Rules of Appellate Procedure

Rule 8(2)	11
-----------------	----

Montana Constitution

Art. II, § 24	9, 13
---------------------	-------

United States Constitution

Amend. VI	13
-----------------	----

STATEMENT OF THE ISSUES

1. Where the issue was raised for the first time on appeal, did McClure waive his right to be present at trial, when he voluntarily absented himself from the courtroom?

2. Where, again, the issue was raised for the first time on appeal, did the district court violate McClure's right to represent himself in his third trial, where McClure did not unequivocally request to proceed pro se?

STATEMENT OF THE CASE AND THE FACTS

Appellant Shawn Earl McClure (McClure) appeals from the jury verdict and judgment convicting him of felony partner or family member assault. (10/1/09 Tr. at 459-60; D.C. Docs. 173, 182.) McClure's 13-year-old son, W.M., came home from school one Friday afternoon to find his father drunk and belligerent. (9/30/09 Tr. at 208-12.) McClure yelled at W.M. in an angry and threatening manner, put him in a headlock, and struck him in the collarbone area, thus causing W.M. pain, bodily injury, and fear. (9/30/09 Tr. at 211-18; see Second Amend. Inform., D.C. Doc. 104.) On appeal, McClure does not challenge the facts or evidence presented against him at trial.

There were three trials held in this matter. McClure had early on demanded that he be allowed to represent himself in this matter, but the district court initially

denied that request after holding Faretta hearings on the record. (12/2/08 Tr. at 1-40; 1/23/09 Tr. at 1-26; D.C. Doc. 40.) The first trial, while McClure was represented by counsel, Mary Kramer, resulted in a hung jury. (D.C. Docs. 72, 73, 83.) Ms. Kramer later withdrew and substituted John Hud as counsel. (D.C. Docs. 112, 116.)

Before the second trial, McClure again sought to represent himself and tried to terminate Mr. Hud. (D.C. Doc. 119; 6/17/09 Tr. at 1-2.) The district court first denied the request based on McClure's failure to cooperate in the hearing (6/17/09 Tr. at 1-6; D.C. Doc. 123), but then reconsidered at Mr. Hud's request and, following a detailed Faretta colloquy, allowed McClure to represent himself. (D.C. Docs. 126, 129; 6/18/09 Tr. at 1-2, 19-20.) The second trial commenced with McClure representing himself and Mr. Hud serving as standby counsel, but neither the trial nor McClure's self-representation lasted long. (7/6/09 Tr. at 1-115; D.C. Doc. 146.)

After the State had completed its voir dire of the jury, McClure started in and immediately violated the district court's order in limine that restricted McClure from mentioning in front of the jury certain things, specifically that there had been a prior trial in this matter. (7/6/09 Tr. at 85-87; see D.C. Doc. 137.) At the very beginning of the second trial, the district court had read the order in limine to McClure on the record and warned him that if he violated the order or disrupted the trial he would first lose his right to represent himself and might also be removed from the courtroom. (7/6/09 Tr. at 2-4.)

Based on McClure's willful violation of the order, the district court declared that McClure had forfeited and waived his right to represent himself and appointed Mr. Hud to take over the defense of the case. (7/6/09 Tr. at 87-88, 91-92.) Asked by the court whether he understood what had happened, McClure twice responded, "Yup." (Id. at 88, 92.) The district court found on the record that McClure was "now represented by counsel." (Id. at 92.) Mr. Hud would later explain to the jury that a person may voluntarily waive counsel and choose to represent himself, but may lose that right if he acts out or fails to follow the rules and procedures of the court. (Id. at 95.) "That is what happened to Mr. McClure and that's why I've been appointed as standby counsel." (Id.)

As Mr. Hud was commencing his presentation to the jury, McClure interrupted with disruptive and inappropriate remarks and was removed from the courtroom. (7/6/09 Tr. at 93-94.) After McClure was gone, voir dire continued for a little while, but it became readily apparent that McClure's outbursts were deeply prejudicial to the potential jurors' fairness and impartiality and the district court declared a mistrial on the State's motion. (Id. at 94-111.) Mr. Hud objected to the mistrial on behalf of McClure, based on his client's professed interest in his speedy trial rights. (Id. at 109, 111.)

After the jury was excused, the district court set a scheduling conference at which the court would set a new trial date. (7/6/09 Tr. at 114; D.C. Doc. 149.)

The third trial was set, and Mr. Hud appeared at hearings and filed motions on McClure's behalf as his attorney. (D.C. Docs. 150, 151, 154, 156, 164, 165.)

Although the court minutes of the final pretrial conference reflect that McClure "addressed the Court regarding his rights" (D.C. Doc. 164), there is no transcript of that hearing in the record on appeal to determine what that discussion was about. There is no indication in the record, following his removal from self-representation during the second trial, that McClure objected to being represented by Mr. Hud or made an unequivocal request to represent himself in the third trial.

At the third trial, McClure appeared in the district court with counsel, Mr. Hud. (D.C. Docs. 167, 168; 9/30/09 Tr. at 1-2.) Preliminarily, the district court addressed McClure's request, apparently made at the final pretrial conference, that he "did not wish to attend or participate in this trial" and McClure said that was true. (9/30/09 Tr. at 2.) At that, the district court advised McClure that he had a right not to be there and the court would respect that. (Id.) The district court also made available to McClure the option of watching his trial by video in another room in the courthouse, but McClure refused. (Id.) When asked if he was sure he did not want to be present, McClure stated: "Absolutely, positively." (Id.) With a final diatribe from McClure espousing his views on the general denial of his rights--no part of which asserted his right to represent himself--McClure was excused and his wish to be absent granted. (Id. at 3-4.)

Neither McClure nor his attorney objected to McClure's absence, demanded a personal or written waiver on the record, or characterized his absence as anything other than voluntary. In fact, Mr. Hud consented to the district court's proposed jury instruction regarding McClure's voluntary absence. (9/30/09 Tr. at 6; 10/1/09 Tr. at 392, 412 ; see Instr. 20, D.C. Doc. 172.) The State mentioned in voir dire, without objection from the defense, McClure's absence, his right to be voluntarily absent, and the court's instruction. (9/30/09 Tr. at 38.) The district court made reference throughout the trial to the fact that McClure was absent "by his own choice" or "voluntarily." (Id. at 172, 191; 10/1/09 Tr. at 308, 373, 395, 455, 458.)

On the second day of trial, McClure appeared before the district court for the limited purpose of discussing some of his papers that had been missing. (10/1/09 Tr. at 308-14.) After he addressed the court on that topic, McClure again indicated that he still wished to absent himself from trial and he was excused. (Id. at 315, 458.) In the defense closing argument, Mr. Hud exhorted the jury: "You promised that you would not hold it against the Defendant if he wasn't even here in Court because that was his right." (Id. at 428.)

At the State's suggestion--to clarify a point of law and get defense counsel's agreement--and following discussion on the record, the district court found and concluded, in addition to McClure's voluntary absence from trial, that it was in the interest of justice that the verdict be returned in McClure's absence. (10/1/09 Tr.

at 455-59.) Defense counsel did not object, or take a position on this issue, except to say: “Your Honor, as far as I know, he hasn’t changed his mind about wanting to be present. I didn’t go over and talk to him, but I’d be totally shocked if all of a sudden he says, I want to be there for the verdict.” (Id. at 457.)

The district court sentenced McClure to 5 years in Montana State Prison, without eligibility for parole and with credit for 523 days served; payment of \$80 in fees; and registration as a violent offender. (D.C. Doc. 182 at 2, 6-8; Sent. Tr. at 25-30.) McClure does not challenge any part of his sentence on appeal.

SUMMARY OF THE ARGUMENT

McClure raises both issues on appeal for the first time in this Court. Neither McClure nor his attorney ever objected in the district court to his voluntary absence from the trial, nor to the lack of a personal on-the-record waiver of McClure’s right to be present and defend. The record, furthermore, is clear that McClure’s absence was voluntary and, therefore, an appropriate waiver of his right to be present at trial. The State recently made essentially the same arguments in State v. Huffine, DA 09-0283.

As to McClure’s right to represent himself, there was likewise no objection to his being represented by counsel during his third trial and no unequivocal request--or any request at all--by McClure at that time to proceed pro se. McClure was given the chance to represent himself in the second trial, but he was unable to

abide by the rules and procedures of court and he forfeited his right to self-representation. Thereafter, McClure was represented by counsel and he never objected or sought a change in that arrangement. He cannot stand now in this Court to raise a right he ignored in the district court.

ARGUMENT

I. McCLURE WAIVED HIS RIGHT TO PERSONALLY APPEAR AND DEFEND AT TRIAL BY VOLUNTARILY REMOVING HIMSELF FROM THE COURTROOM, AND HE RAISES THE ISSUE FOR THE FIRST TIME ON APPEAL.

A. Standard of Review

Whether a criminal defendant's right to be present at the critical stages of his or her trial has been violated is a question of constitutional law, and this Court exercises plenary review of such questions. State v. McCarthy, 2004 MT 312, ¶ 29, 324 Mont. 1, 101 P.3d 288.

B. McClure Raises the Issue of His Absence From Trial for the First Time on Appeal.

First, as a general rule, a party may raise on direct appeal only those issues and claims that were properly preserved by timely objection in the trial court. State v. West, 2008 MT 338, ¶ 16, 346 Mont. 244, 194 P.3d 683; see Mont. Code Ann. § 46-20-104(2). Beyond the mere failure to object, "acquiescence in error takes away the right of objecting to it." State v. Malloy, 2004 MT 377, ¶ 11,

325 Mont. 86, 103 P.3d 1064 (citing Mont. Code Ann. § 1-3-207). This Court “will not put a district court in error for an action in which the appealing party acquiesced or actively participated.” State v. Micklon, 2003 MT 45, ¶ 10, 314 Mont. 291, 65 P.3d 559.

The record in this case indicates that neither McClure nor his counsel made a timely objection to McClure’s trial proceeding without him or to the trial court’s alleged failure to obtain an on-the-record, personal waiver of McClure’s right to be present. McClure acknowledges on appeal there was no objection. (Appellant’s Br. at 7, 15.) Thus, this is an issue that McClure raises for the first time on appeal. As this Court has noted numerous times in the past, this Court will not put a trial court in error for an action in which the appealing party acquiesced or actively participated. State v. Hurlbert, 2009 MT 221, ¶ 28, 351 Mont. 316, 211 P.3d 869 (citing State v. Cybulski, 2009 MT 70, ¶ 61, 349 Mont. 429, 204 P.3d 7). Having failed to give the district court an opportunity in the first instance to remedy this alleged error, this Court should consider the issue waived.

C. McClure’s Voluntary Absence Constituted a Waiver of His Right to Be Present.

On the merits, a defendant has a fundamental right to be present at all stages of a criminal proceeding under both the federal and Montana Constitutions.

McCarthy, ¶ 30. The Montana Constitution provides: “In all criminal

prosecutions the accused shall have the right to appear and defend in person and by counsel” Mont. Const., art. II, § 24.

There are, however, instances in which a criminal defendant may be constitutionally absent from his trial on felony charges, once trial has commenced in his presence. Thus, pursuant to statute, after the trial of a non-capital felony offense has commenced in the defendant’s presence, as in this case (9/30/09 Tr. at 1-2 (“This is the time and place set for the jury trial”)), the defendant’s absence during trial may not prevent continuation of the trial when the defendant, one, “has been removed from the courtroom for disruptive behavior after receiving a warning,” or two, “is voluntarily absent.” Mont. Code Ann. § 46-16-122(3). This Court has recognized this statutory provision and stated that a defendant can waive his fundamental right to be present at trial in two ways: (1) failing to appear; or (2) through an express personal waiver. McCarthy, ¶¶ 31-32.

In McCarthy, the defendant “chose not to appear in court” and his voluntary absence precluded the district court from obtaining an on-the-record personal waiver, although he did provide a written waiver allowing his voluntary absence. McCarthy, ¶ 35. Likewise, the United States Supreme Court has held that a defendant effectively waives his right to be present at trial by his voluntary absence. Taylor v. United States, 414 U.S. 17, 19-20 (1973); see also Diaz v. United States, 223 U.S. 442, 455 (1912). The issue here, then, is whether McClure was

voluntarily absent. See State v. Clark, 2005 MT 169, ¶¶ 15-17, 327 Mont. 474, 115 P.3d 208 (misdemeanor trial in absentia when defendant voluntarily absent).

Here, it is undisputed that McClure was present at the commencement of his trial and his subsequent absence was voluntary. (9/30/09 Tr. at 1-2, 6, 38, 172, 191; 10/1/09 Tr. at 308, 315, 392, 395, 412, 428, 455, 457; Instr. 20, D.C. Doc. 172.) Therefore, under McCarthy, Taylor, and Mont. Code Ann. § 46-16-122(3), McClure's voluntary absence constituted a waiver of his right to be present.

While the defendant in McCarthy provided a written waiver, this Court did not hold that such a formality was required in order to proceed with trial in light of his voluntary absence. As the Court said: "The trial had commenced in McCarthy's presence, therefore, pursuant to § 46-16-122, MCA, he could choose to be voluntarily absent the second day." McCarthy, ¶ 36. The written waiver merely "established" that McCarthy was informed of his right to be present and that he did, in fact, waive it. McCarthy, ¶ 36. As the Court said, there are two ways to waive the right to be present at trial: by failing to appear (i.e., by voluntary absence under the statute); or through an express personal waiver. McCarthy, ¶¶ 31-32. McCarthy waived the right by being voluntarily absent, a fact established and supported by a written (not personal) waiver.

In this case, McClure likewise waived the right by his conduct of voluntarily leaving the courtroom. (9/30/09 Tr. at 1-3.) McClure was present for the start of

trial, he knew he had the right to be there, and he was informed of and voluntarily exercised his right not to be present. McClure's intent to voluntarily absent himself from trial is apparent from the record where the district court found that McClure, at the final pretrial conference, advised the court that he "did not wish to attend or participate in this trial." (9/30/09 Tr. at 2.) McClure has not argued on appeal this expression of his wishes was inaccurate--nor should he be heard to do so, because he has provided no transcript of the pretrial hearing in the record on appeal to indicate what, if anything, McClure might have said to the contrary. See Mont. R. App. P. 8(2). The record of the September 21, 2009 hearing, reflects only that, McClure "addressed the Court regarding his rights" and that the court discussed transporting McClure and "his presence at trial." (D.C. Doc. 164.)

At the end of trial McClure's attorney represented that McClure had not "changed his mind about wanting to be present" and he would be "totally shocked if all of a sudden he says, I want to be there for the verdict." (10/1/09 Tr. at 457.) The district court concluded in the interest of justice, pursuant to statute and in addition to his voluntary absence at trial, that the verdict could be returned and the sentence be pronounced in McClure's absence. Mont. Code Ann. § 46-16-123(2)(a).

Finally, even if there was some technical error by not obtaining an express personal waiver on the record, this Court should affirm because McClure can make no showing of "any conceivable prejudice." State v. Price, 2009 MT 129, ¶¶ 24, 32,

350 Mont. 272, 207 P.3d 298 (quoting State v. Godfrey, 2009 MT 60, ¶ 25, 349 Mont. 335, 203 P.3d 834). The district court gave McClure the opportunity to view and listen to the trial but McClure flatly refused. (9/30/09 Tr. at 2.) The district court also gave an instruction advising that McClure had the right to voluntarily choose not to attend trial, and prohibiting the jury from drawing any inferences from the fact that he was voluntarily absent from trial. (9/30/09 Tr. at 412; Instr. 20, D.C. Doc. 172.) The jury, of course, is presumed to use proper restraint in considering evidence only for a particular purpose when admitted pursuant to a cautionary instruction. See State v. Brush, 228 Mont. 247, 252, 741 P.2d 1333, 1336 (1987); see also State v. Dubois, 2006 MT 89, ¶¶ 60-61, 332 Mont. 44, 134 P.3d 82. Under these circumstances and with this cautionary instruction, there can be no conceivable prejudice suffered by McClure by his voluntary absence from trial.

II. McCLURE DID NOT MAKE AN UNEQUIVOCAL REQUEST TO REPRESENT HIMSELF AT HIS THIRD TRIAL, AND RAISES THE ISSUE FOR THE FIRST TIME ON APPEAL.

A. Standard of Review

To determine whether a request for self-representation was unequivocal, this Court reviews the record as a whole. State v. Swan, 2000 MT 246, ¶ 20, 301 Mont. 439, 10 P.3d 102 (citing State v. Langford, 267 Mont. 95, 101, 882 P.2d 490, 493 (1994)).

B. Discussion

The Sixth Amendment of the United States Constitution has been interpreted to include a defendant's right to represent himself. Langford, 267 Mont. at 99 (citing Faretta v. California, 422 U.S. 806 (1975)). This Court has also interpreted article II, section 24 of the Montana Constitution to provide the right of the defendant to proceed pro se. Langford, 267 Mont. at 99 (citing State v. Colt, 255 Mont. 399, 403, 843 P.2d 747, 749 (1992)).

Two things are required to exercise the right to represent oneself: a waiver of the right to counsel made knowingly, voluntarily, and intelligently, see Mont. Code Ann. § 46-8-102; and an unequivocal request to proceed pro se. Langford, 267 Mont. at 99-102 (citing United States v. Robinson, 913 F.2d 712, 714 (9th Cir. 1990); Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989)). This Court concluded that Langford's request to represent himself was equivocal, and, therefore, the district court's refusal to allow him to represent himself did not deny his constitutional right. Langford, 267 Mont. at 102. This Court noted: "It is presumed that a defendant who equivocates has requested assistance of counsel." Langford, 267 Mont. at 102 (citing Carroll, 875 F.2d at 1444).

This Court indulges every reasonable presumption against waiver of the right to counsel. State v. Browning, 2006 MT 190, ¶ 14, 333 Mont. 132, 142 P.3d 757 (citing Swan, ¶¶ 16-17). A defendant cannot be deemed pro se by default; the

record must support the conclusion that a defendant unequivocally requested to proceed pro se. Browning, ¶ 22. Thus, this Court concluded the following was anything but unequivocal: “Although Swan asked to be allowed to represent himself, what he ‘actually . . . hoped for’ was that new counsel would be appointed to represent him and that he would be allowed to use the law library.” Swan, ¶ 25. Similarly, there was no denial of a defendant’s right to represent himself where the defendant did not seek permission, or otherwise assert his right, to proceed pro se. State v. Craig, 274 Mont. 140, 906 P.2d 683, 692 (1995).

In this case, there is no evidence at all in the record that McClure made any request, let alone an unequivocal request, to proceed pro se in his third trial. Just as in Craig, McClure did not seek permission or otherwise assert his right to represent himself. There is no question McClure made such a request at earlier stages of the proceedings--and the district court relented and allowed him to proceed in representing himself. (See D.C. Doc. 129.) However, because McClure immediately and willfully violated the court’s order in limine, the district court declared that McClure had forfeited and waived his right to represent himself and appointed standby counsel, Mr. Hud, to take over the defense of the case. From that point forward the record is manifest that McClure was represented by counsel and nothing in the record indicates anything to the contrary. McClure made no request to proceed pro se in his third trial, and therefore, his right to

represent himself was never raised before the district court and was clearly not violated.

As with the question of his voluntary absence at trial, see supra at 7-8, this is an issue that McClure raises for the first time on appeal. Again, this Court will not put a trial court in error for an action in which the appealing party acquiesced or actively participated. Hurlbert, ¶ 28. Having failed to give the district court an opportunity in the first instance to remedy this alleged error, this Court should consider the issue waived.

CONCLUSION

This Court should affirm McClure's conviction for felony partner or family member assault where McClure was, without objection, voluntarily absent from trial and represented by counsel.

Respectfully submitted this ____ day of May, 2010.

STEVE BULLOCK
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
JONATHAN M. KRAUSS
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

Mr. Colin M. Stephens
Smith & Stephens, P.C.
315 West Pine
Missoula, MT 59802

Ms. Ashley Whipple
Deputy Gallatin County Attorney
1709 W. College
Bozeman, MT 59715

DATED: _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding certificate of service and certificate of compliance.

JONATHAN M. KRAUSS